Board of Alien Labor Certification Appeals

United States Department of Labor
Washington, D.C.

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DATE: April 28, 1997

CASE NO: 95-INA-628

In the Matter of:

CAFE 300,
Employer,

On Behalf of:

JUAN ANGEL MATA,
Alien

Appearance: S. G. Kooritzky, Esq.
Arlington, Virginia, for the Employer and the Alien

Before: Huddleston, Holmes, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of the Juan Angel Mata (Alien) filed by Cafe 300 (Employer), pursuant to § 212(a)(14)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(14)(A) (the Act), and regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at Philadelphia denied this application, the Employer requested review pursuant to 20 CFR § 656.26. This decision is based on the record upon which the CO denied certification and on the Employer's request for review, as contained in the Appeal File (AF), and the written arguments of the parties. 20 CFR § 656.27 (c).

Statutory authority. An alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient U. S. workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and

(2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. See 8 U.S.C. § 1182(a)(14)(A). An employer desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the employer's efforts to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

Application. On February 11, 1993, the Employer filed an application for labor certification to enable the Alien, an El Salvador national, to fill the job of "Cook." AF 32-35. The job was described as follows in the Employer's application:

> Prepares, seasons, and cooks variety of dishes including soups, sauces, salads, meats, vegetables, desserts and other foodstuffs, divides into portions, garnishes and serves to waiters on order.

The general working conditions were a forty hour week, 7:00 A.M. to 3:00 P.M., at $10.46 @ hour. No educational requirement was noted, but the Employer required two years of experience on the job. AF 32. The job was duly advertised and posted. Although four U. S. workers applied for the job, none was hired. AF 28-31. After the Virginia Employment Commission which classified the job under DOT Code # 313.361-014 SVP 7 under the DOT title, "Cook," the file was transmitted to the CO. AF 21-27.

Notice of Finding. The February 23, 1995, Notice of Finding (NOF) advised the Employer that unless the rebuttal by Employer corrected the defects noted, the CO would deny certification. After the CO reviewed the menu and other documentation, the job was reclassified by the CO as a "Cook, Fast Food," as described by Occupational Code 313.374-010 SVP 5, in the Dictionary of Occupational Titles ("DOT").[1] The change was based on the limited nature of the restaurant menu, said the CO.

The CO then found (1) that the Employer's application contained an unduly restrictive requirement under 20 CFR § 656.21(b)(2) in that the two years of experience required by the Employer exceeded the normal requirements of six months to one years combined education, training, and experience, as defined in the DOT. By way of rebuttal the Employer was given the choice of reducing the requirements to the DOT standard for proficiency in

[1]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor, Fourth Edition (Revised 1991).

the occupation or submitting evidence that the qualifications it required arose from demonstrated business necessity.

Rebuttal. Employer's rebuttal disputed the classification of this position as "Cook, Fast Food" on grounds (1) that the broad variety of dishes it serves require "cooking from scratch," (2) that this job requires training and experience" over an extended period of time" to achieve a reasonable level of proficiency, (3) that a "Fast Food Cook" cannot perform the work of this position, and (4) that the DOT description of a "Cook-Fast Food" does not accurately describe the work of this position and that the DOT duties of a "Cook-Restaurant" closely conform to the work of the job it seeks to fill. AF 12-14.

Final Determination. On May 26, 1995, the CO's Final Determination again concluded that Employer did not meet the criteria of 20 CFR Part 656 for the reasons stated in the NOF, and the CO denied certification under the Act and regulations. AF 09-11. Noting the rebuttal evidence in response to the Notice of Findings, the CO observed that Employer's rebuttal was primarily a challenge to the reclassification of this position from Cook to Cook, Fast Food. The CO said Employer's argument turns on the evidence of a special lunch catering portion of the menu Employer submitted as documentation. Half of the specially catered lunch items are delicatessen platters, and it described the remaining six items as "hot meal/Chinese style." The forty-three regularly priced items in the menu consisted of breakfast and lunch dishes. The CO said, "The items listed on the menu do not represent a broad variety of foods, nor do they require extensive preparation and cooking time." Broadly speaking, the CO said, the menu did not support Employer's representation that the job requires "a great deal of experience" and "work as a trainee cook for an extended period of time to become proficient."

Responding to Employer's assertion that it would not be possible for a Fast Food Cook to perform the duties of the job offered, the CO said, "On the contrary, the job duties of a Cook, Fast Food, conform with your menu items." As to the Employer's contention that the DOT description of a Cook-Fast Food does not express the complexity of the duties of the position, while the description of a Cook-Restaurant "conforms almost exactly" with the position offered, the CO explained that the Employer's menu does not support that contention, since the menu items are not "complex." Consequently, the CO said the menu did not support Employer's representation that the job requires "a great deal of experience" and "work as a trainee cook for an extended period of time to become proficient." The evidence of record led the CO to infer from Employer's rebuttal argument that it did not dispute the impression that no more than a minimal proportion of the worker's time would be spent in the production of "truly complex dishes," while as much as ninety-percent of the work would be in the production of fast food. The CO rejected Employer's argument

that the job should be classified as a "full-scale cook instead of a fast food cook" for the purpose of satisfying its need for a worker with the higher level of skills.

Concluding that the Employer's requirement of two years' experience was unduly restrictive, that the difference was based on Employer's requirement of two years of experience and exceeded the level of training specified in the DOT, and that the Employer had failed to take corrective action authorized by the NOF, the CO denied certification. AF 09-11.

Appeal. Employer then appealed this decision on grounds that the CO incorrectly applied the law to the facts of this case and failed to recognize the true nature of the position. The Employer then argued that certification was denied based on an issue into which the CO made no inquiry, referring to the "significance" or the "volume" of the dishes that required greater cooking skill. AF 03-04.

Discussion

It is well-established that the CO must weigh the evidence and rebuttal before reaching a conclusion in classifying positions under the DOT. **Exxon Chemical Company,** 87-INA-615(July 18, 1988)(*en banc*)[2]. As the CO's reasons for denying Employer's application are based entirely on the CO's classification of the job opportunity under the DOT criteria, the documentation was reexamined to determine whether the classification of the job was correct.[3] If error is found, the remedy must provide relief in terms appropriate to the facts of this case. **Transgroup Services, Inc.**, 88-INA-428(Feb. 21, 1990).[4]

When the duties described in Employer's ETA Form 750A were reexamined the Final Determination failed to yield a credible reason for the finding that the duties of the position stated in the application and record were closer to the DOT job description for a Cook, Restaurant than to the usual work of a Cook, Fast Food. **A.D.M. Corporation**, 90-INA-180(Dec. 12, 1991). The CO's classification of the Employer's job offer was reconsidered in terms of both the DOT criteria and the foods it actually served the customers using its menu. There appears to be no dispute

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[2]Also see **Yedico International, Inc.**, 87-INA-740(Dec. 20, 1988).

[3]See for example the holding in **LDS Hospital, Dept. of Medical Information,** 87-INA-558(April 11, 1989)(*en banc*), where error was found on grounds that the CO erred in assigning the occupational title.

[4]See **Foria International, Inc.**, 88-INA-375(July 27, 1989), where BALCA found the CO had misclassified the job, reversed the CO's denial, and granted the certification requested.

that the menu is a reasonable statement of the items Employer serves its clientele for breakfast and lunch. As no evidence appears that the Employer does in fact serve any of the listed catered meals or that its catered meal volume is a material proportion of either its restaurant service volume or its restaurant revenues, the consensus of the parties that the need for a cook to prepare any items on the catered menu is minimal is accepted and found on the basis of the evidence of record.

Finally, the Employer has argued in its appeal that the CO did not inquire into the "significance" or the "volume" of the Chinese dishes it serves from its catering menu. In other words, the Employer contends that the NOF did not place it on notice that this fact required proof in its rebuttal, an argument that would be persuasive, if it was correct. Employer is incorrect, however. The NOF gave the Employer the choice of either amending its application or establishing the business necessity of the level of experience required for the job, as stated in the application. 20 CFR § 656.21 (b)(2).

The representations of fact in the Employer's brief were not based on any document of record that is signed by the Employer or on any credible factual evidence. While such a written assertion may constitute documentation that must be considered, its bare assertion without supporting reasoning or evidence does not carry Employer's burden of proof. **Gencorp**, 87-INA-659 (Jan. 13, 1988) *(en banc*). BALCA has held that unsupported conclusions, *i.e.*, statements without explanation or factual support, are not sufficient to demonstrate that an Employer's job requirements are either normal for a position or supported by business necessity. **Inter-World Immigration Service**, 88-INA-490 (Feb. 17, 1989), citing **Tri-P's Corp., dba Jack-In-The-Box**, 88-INA-686(Feb. 17, 1989). Based on those reasons, Employer's vague and incomplete contentions in its rebuttal and appeal do not meet the burden of proof in establishing business necessity in this case. **Analysts International Corporation,** 90-INA-387 (July 30, 1991); also see discussions by Judge Huddleston in **Dunkin Donuts,** 95-INA-192(Jan. 22, 1997); and **Sidhu Associates, Inc.**, 95-INA-182(Jan. 2, 1997).

The reason, as BALCA explained, is that such proof required Employer to establish that the two years of experience in the job it requires is reasonably related to this occupation in the context of its restaurant business, and that this requirement is essential to the performance in a reasonable manner of the job duties described by its application. **Information Industries, Inc.,** 88-INA-082 (Feb. 09, 1989)(*en banc*). The Employer in this case was expected to show as its proof of business necessity to support the certification of this Alien that a material volume of the menu items it normally serves require the special skills of a Cook-Restaurant. The evidence of such a business necessity would include the nature and the content of its restaurant and catering

business, placing specific emphasis on the relative volume of the Chinese dishes it normally sold from its catering menu.

Employer repeatedly conceded that its business volume in this category was minimal, however, preferring to emphasize that its requirement of a Cook-Restaurant was based on the need to be ready to satisfy an order of a Chinese dish on the catering menu if, as, and whenever it might come. Employer's argument suggests that it is unaware that the immigration certification the Act provides is intended to be a benefit by virtue of the privileged status the statutory certification confers on the Alien as an exception to the limitations adopted by Congress on admission of foreign workers into the United States for permanent residence and employment. The object of the immigration certification that is granted under the Act and regulations is to provide favored treatment to limited classes of foreign workers who the Congress expects to bring to the U. S. labor market needed skills that are not otherwise available. See 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and the character of this statutory privilege is clearly indicated by the quotation in 20 CFR § 656.2(b) of a portion of the text of § 291 of the Act (8 U. S. C. 1361), which describes the burden of proof that Congress placed on the applicants in certification proceedings:

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act ... .

Such proof of eligibility must be demonstrated by evidence of the Employer that it has made a *bona fide* effort to recruit U. S. workers who are able, willing, qualified and available to perform the job at issue.[5]

When considered in the context of the exception which § 291 of the Act (8 U.S.C. 1361) was enacted to provide, the asserted business necessity this Employer has demonstrated is so minimal that on its face it clearly fails to support the invocation of the benefits that the Employer seeks.

Accordingly, the following order will enter.

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[5]**Pesikoff v. Secretary of Labor**, 501 F2d 757, 761-762(D.C. Cir., 1974), *Cert den*. --- U. S. ---, 95 S.Ct 525(Nov. 25, 1974).

ORDER

The Certifying Officer's denial of labor certification is hereby affirmed for the reasons set forth hereinabove.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **CAFE 300**, Employer,
JUAN ANGEL MATA, Alien

No: 96-INA-628

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: April 25, 1997.